**DALIP BHAGWAN SINGH**

**v.**

**PUBLIC PROSECUTOR**

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
PEH SWEE CHIN FCJ
WAN ADNAN ISMAIL FCJ
[CRIMINAL REFERENCE NO: 06-3-91]
4 NOVEMBER 1997

***CONSTITUTIONAL LAW:*** *Courts - Federal Court - Stare decisis - Principles and application - Power to depart from previous decisions - Whether later decision prevails over earlier decision - Whether decision of panel with more than three members has more weight than decision of panel with three members - Whether courts below may refuse to apply ratio of latest Federal Court decision and adopt ratio of an earlier Federal Court decision*

***CONSTITUTIONAL LAW:*** *Courts - Court of Appeal - Stare decisis - Principles and application - Whether bound by its own previous decisions - Exceptions - Young v. Bristol Aeroplane Co Ltd - Whether may choose between its previous conflicting decisions irrespective of their dates*

***CONSTITUTIONAL LAW:*** *Courts - Stare decisis - High Court - Courts below Court of Appeal - Whether to follow exceptions in Young v. Bristol Aeroplane Co Ltd - Whether may choose between conflicting decisions irrespective of their dates*

***EVIDENCE:*** *Standard of proof - Close of prosecution - Prima facie test - Whether trial judge entitled to assess and weigh reliability, credibility and veracity of prosecution witnesses*

***EVIDENCE:*** *Corroboration - Accomplice evidence - Whether mere act of trial judge warning himself sufficient to prevent conviction from being quashed - Whether trial judge must go on to say that case was proven beyond reasonable doubt - Whether appellate judge may reverse acquittal without dealing with reason given by trial judge on need for corroboration*

***CRIMINAL PROCEDURE:*** *Prosecution - Close of prosecution - Criminal Procedure Code (Amendment) Act 1997 - Whether retrospective - Whether only applicable to acts or omissions committed on or after 31 January 1997*

***CRIMINAL PROCEDURE:*** *Prosecution - Close of prosecution - Acts or omissions committed before 31 January 1997 - Standard of proof required - Whether 'beyond reasonable doubt' standard still applicable - Ratio in Arulpragasan Sandaraju v. PP - Whether retrospective*

***CONSTITUTIONAL LAW:*** *Fundamental liberties - Retrospective legislation - Presumption in respect of legislation on substantive law - Presumption in respect of legislation on evidence and procedural law - Vested rights - Federal Constitution, art. 7 - Power of legislature to make retrospective civil and criminal law*

The applicant was charged in the Sessions Court with an offence of cheating (alleged to have taken place in 1983) but was acquitted and discharged in 1985 at the close of the case for the prosecution without his defence being called. On appeal by the Public Prosecutor, the High Court set aside the order of acquittal and ordered a retrial. At the retrial, the applicant was, again, acquitted and discharged by the Sessions Court at the close of the case for the prosecution without his defence being called. The Public Prosecutor appealed and, once again, the High Court set aside the order of acquittal and ordered the applicant to enter on his defence. Dissatisfied, the applicant applied for leave to refer certain questions of law to the Supreme Court. In 1991, the Supreme Court allowed the application in respect of the following questions of law: (i) whether, in an appeal against an acquittal at the close of the case for the prosecution, an appellate judge may refuse to apply, with or without assigning any reasons, the latest decision of the Supreme Court on a point of law and adopt an earlier decision of the Federal Court; (ii) whether, in hearing the appeal against the acquittal at the close of the case for the prosecution, the High Court was right in law in holding that the Sessions Court was wrong to have assessed and weighed the reliability, credibility and veracity of the prosecution witnesses; and (iii) whether, in an appeal against an acquittal, where the trial judge finds corroboration to be necessary on an essential ingredient of the charge, an appellate judge may reverse the order of acquittal without dealing with the reason given by the trial judge on the need for such corroboration.

**Held:**
**Per Peh Swee Chin FCJ**

**[1]** The doctrine of *stare decisis* dictates that a court, other than the highest court, is obliged generally to follow the decisions of the courts at a higher level or at the same level. There are, however, exceptions to this general rule, especially those affecting the Court of Appeal. These exceptions, as embodied in *Young v. Bristol Aeroplane Co Ltd*, are part

of the Malaysian common law by virtue of s. 3 of the Civil Law Act 1956. It is also possible to have further exceptions as long as they are not inconsistent with the ones established in *Young v. Bristol Aeroplane Co Ltd*.

**[1a]** The Court of Appeal is, as a general rule, bound by its own decisions. The three exceptions enunciated in *Young v. Bristol Aeroplane Co Ltd* are: (i) a decision of the Court of Appeal given *per incuriam* need not be followed; (ii) when faced with a conflict in respect of its own previous decisions, the Court of Appeal may choose which decision to follow **irrespective** of the dates of those decisions; and (iii) the Court of Appeal ought not to follow its own previous decisions if such decisions are, expressly or by necessary implication, overruled by the Federal Court, or if they cannot stand with a decision of the Federal Court. In respect of exception (i) above, the words "*per incuriam*" are to be interpreted narrowly to mean a "... decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned ..."

**[1b]** Courts in the tiers below the Court of Appeal cannot rely on the '*per incuriam* exception' applied by the Court of Appeal for itself, but **may** choose between two conflicting decisions **irrespective** of the dates of those conflicting decisions.

**[1c]** Although the *Practice Statement (Judicial Precedent) 1966* issued by the House of Lords is not binding on the Federal Court, it has, indeed, and in practice, been followed. The Federal Court (and its forerunner the Supreme Court) has never refused to depart from its own previous decisions when it appeared right to do so. This power to depart should be, and always has been, exercised sparingly. In contrast, the power to depart is indicated when a previous decision sought to be overruled is wrong, uncertain, unjust, outmoded or obsolete in modern conditions.

**[1d]** The effect or weight of a decision of a panel of the Federal Court comprising more than three members or a 'full court' and that of an ordinarily constituted quorum comprising three members is the **same**.

**[1e]** When two decisions of the Federal Court conflict, on a point of law, the later decision prevails over the earlier decision.

**[1f]** Consequently, and in answer to question (i) of the reference, in an appeal against an acquittal at the close of the case for the prosecution, an appellate judge may **not** refuse to apply the latest decision of the Federal Court on a point of law and adopt an earlier decision of the same court.

**[2]** At the time of the hearing of the appeal in the High Court against the Sessions Court's order of acquittal, the standard of proof required of the prosecution at the close of its case was still the '*prima facie*' standard. The dicta in the cases of *Munusamy v. PP*, *Haw Tua Tau v. PP*, and *PP v. Chin Yoke* – which formed the bedrock of the '*prima facie*' test – would **disentitle** a judge from assessing the veracity or credibility of the prosecution witnesses at that stage.

**[2a]** Consequently, and in answer to question (ii) of the reference, the High Court was right in law in holding that the Sessions Court was wrong to have assessed and weighed the reliability, credibility and veracity of the prosecution witnesses.

**[3]** It is a well-known rule that a judge must warn himself of the danger of convicting an accused person on the evidence of an accomplice unless such evidence is corroborated; in the absence of such a warning, an appellate court will quash the conviction. The mere act of a judge warning himself is **not** sufficient to prevent the quashing of the conviction if the judge, without the necessary corroborative evidence, nonetheless decides to convict because he is convinced by the accomplice's evidence despite the risks, **unless**, the judge goes on further to say that the case has been proven beyond a reasonable doubt.

**[3a]** In the present case, the complainant was not an accomplice to the applicant in respect of the charge against the applicant which was one of cheating. However, by virtue of s 146(c) of the Evidence Act 1950, the evidence of the complainant would still have to be treated with some caution as he was a person of bad character.

**[3b]** Consequently, and in answer to question (iii) of the reference, in an appeal against an acquittal, where the trial judge finds corroboration to be necessary on an essential ingredient of the charge, an appellate judge **may** reverse the order of acquittal **without** dealing with the reason given by the trial judge on the need for such corroboration, **provided**, there is undoubtedly sufficient evidence by itself or overwhelming evidence from elsewhere to prove a case against the accused beyond a reasonable doubt.

**[4]** The amendments made by the Criminal Procedure Code (Amendment) Act 1997 to ss. 173(f) and 180 of the Criminal Procedure Code apply **only** to an act or omission constituting a criminal offence committed **on** or **after 31 January 1997**. The amendments are **not** retrospective in operation.

**[4a]** In respect of an act or omission committed **before** 31 January 1997, the standard of proof required of the prosecution at the close of its case is still the 'beyond reasonable doubt' standard as promulgated in *Arulpragasan Sandaraju v. PP*. The *ratio* in *Arulpragasan Sandaraju v. PP* has, practically, **retrospective** effect.

**[5]** In respect of legislation on **substantive** law, there is a rule of presumption that it is **not** retrospective in operation in the absence of a contrary intention by express words or by necessary implication. Conversely, in respect of legislation on **evidence** or **procedure**, the presumption is that it **is** retrospective in operation in the absence of a contrary intention, **unless**, the application of such legislation deprives a person of a vested right and offends art. 7 of the Federal Constitution.

**[6]** Parliament has plenary power to make retrospective criminal and civil law; however, when it makes retrospective criminal law, it must steer clear of art. 7 of the Federal Constitution.

*[Order of High Court set aside; Sessions Court's order of acquittal restored; applicant acquitted and discharged.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG PERLEMBAGAAN:*** *Mahkamah - Mahkamah Persekutuan - Ikatan duluan - Prinsip dan pemakaian - Kuasa untuk menolak keputusan terdahulu - Samada keputusan terakhir mengatasi keputusan terdahulu - Sama ada keputusan panel terdiri dari lebih dari tiga orang ahli mempunyai kekuatan yang lebih dari panel yang terdiri dari tiga orang ahli sahaja - Samada mahkamah bawahan boleh enggan memakai keputusan terakhir Mahkamah Persekutuan dan sebaliknya memakai ratio dalam keputusan terdahulu Mahkamah Persekututan*

***UNDANG-UNDANG PERLEMBAGAAN:*** *Mahkamah - Mahkamah Rayuan - Ikatan duluan - Prinsip dan pemakaian - Samada ianya terikat dengan keputusannya yang terdahulu - Pengecualian - Young v. Bristol Aeroplane Co Ltd - Samada boleh memilih di antara keputusannya terdahulu yang bercanggah tanpa mengira tarikhnya*

***UNDANG-UNDANG PERLEMBAGAAN***: *Mahkamah - Ikatan duluan - Mahkamah Tinggi - Mahkamah di bawah Mahkamah Rayuan - Samada untuk mengikut pengecualian dalam Young v. Bristol Aeroplane Co Ltd - Samada boleh memilih di antara keputusan-keputusan yang bercanggah tanpa mengira tarikhnya*

***KETERANGAN*****:** *Darjah pembuktian - Akhir kes pendakwaan - Ujian prima facie - Samada mahkamah perbicaraan dibenarkan menilaikan dan menimbangkan keyakinan, kebolehpercayaan dan kebenaran cakap saksi pendakwa*

***KETERANGAN:*** *Sokongan - Keterangan rakan jenayah - Sama ada tindakan hakim perbicaraan memberi amaran semata-mata kepada dirinya sendiri adalah cukup untuk mencegah pembatalan sabitan - Sama ada hakim perbicaraan harus terus menyatakan bahawa kes telah dibuktikan tanpa keraguan munasabah - Sama ada hakim rayuan boleh mengakaskan pembebasan tanpa membincangkan sebab yang diberikan oleh hakim perbicaraan berkenaan dengan perlunya sokongan*

***ACARA JENAYAH:*** *Pendakwaan - Akhir kes pendakwaan - Akta (Pindann) Kanun Acara Jenayah 1997 - Samada secara kebelakangan - Samada hanya terpakai kepada tindakan ataupun peninggalan yang dilakukan pada ataupun selepas 31 Januari 1997*

***ACARA JENAYAH****: Pendakwaan - Akhir kes pendakwaan - Tindakan ataupun peninggalan yang dilakukan sebelum 31 Januari 1997 - Darjah pembuktian yang diperlukan - Samada darjah 'tanpa keraguan yang munasabah' masih terpakai - Ratio dalam Arulpragasan Sandaraju v. PP - Samada secara kebelakangan*

***UNDANG-UNDANG PERLEMBAGAAN****: Hak-hak asasi - Perundangan secara kebelakangan - Anggapan berkenaan dengan perundangan berkenaan dengan undang-undang substantif - Anggapan berkenaan dengan perundangan undang-undang keterangan dan prosedur - Hak-hak kukuh - Perlembagaan Persekutuan perkara 7 - Kuasa badan perundangan dalam menggubal undang-undang sivil dan jenayah yang beroperasi secara kebelakangan*

Pemohon telah dituduh di Mahkamah Sesyen dengan kesalahan menipu (yang dikatakan telah dilakukan dalam tahun 1993) tetapi telah dibebaskan dan dilepaskan dalam tahun 1985 pada akhir kes pendakwaan tanpa pembelaannya dipanggil. Atas rayuan pihak pendakwa, Mahkamah Tinggi telah mengetepikan perintah pembebasan dan memerintahkan perbicaraan semula. Semasa perbicaraan semula, pemohon telah sekali lagi dibebaskan dan dilepaskan oleh Mahkamah Sesyen di akhir kes pendakwaan tanpa pembelaannya dipanggil. Pihak pendakwa telah merayu dan sekali lagi Mahkamah Tinggi telah mengetepikan perintah pembebasan dan telah memerintahkan supaya pemohon memasukkan pembelaannya. Oleh kerana tidak puas hati, pemohon telah memohon untuk kebenaran untuk merujuk beberapa persoalan undang-undang kepada Mahkamah Agung. Dalam tahun 1991, Mahkamah Agung telah membenarkan permohonan berkenaan dengan persoalan undang-undang berikut:

(i) samada, dalam suatu rayuan terhadap pembebasan di akhir kes pendakwaan, hakim rayuan boleh enggan memakai, tanpa ataupun dengan sebab-sebab, keputusan terakhir Mahkamah Agung atas persoalan undang-undang dan sebaliknya memakai keputusan terdahulu Mahkamah Persekutuan; (ii) samada, dalam mendengarkan rayuan terhadap pembebasan di akhir kes pendakwaan, Mahkamah Tinggi adalah betul dalam memutuskan bahawa Mahkamah Sesyen adalah salah kerana telah menilaikan dan menimbangkan keyakinan, kebolehpercayaan dan kebenaran cakap saksi pendakwa; dan (iii) samada, dalam rayuan terhadap pembebasan, di mana hakim perbicaraan telah memutuskan bahawa sokongan adalah perlu untuk suatu unsur penting pertuduhan tersebut, hakim rayuan boleh mengakaskan perintah pembebasan tanpa membincangkan sebab yang diberikan oleh hakim perbicaraan atas keperluan sokongan tersebut.

**Diputuskan:**
**Oleh Peh Swee Chin HMP**

**[1]** Menurut doktrin ikatan duluan, pada amnya, kecuali mahkamah yang tertinggi, mahkamah adalah wajib mengikut keputusan mahkamah yang berada pada tahap yang sama ataupun yang lebih tinggi. Walaubagaimanapun, terdapat pengecualian kepada peraturan am ini, terutama yang menjejaskan Mahkamah Rayuan, seperti yang terdapat dalam kes *Young v. Bristol Aeroplane Co Ltd* yang menjadi adalah sebahagian daripada common law Malaysia menurut s 3 Akta Undang-undang Sivil 1956. Mungkin terdapat pengecualian-pengecualian selanjutnya asalkan mereka adalah selaras dengan prinsip-prinsip yang diputuskan dalam *Young v. Bristol Aeroplane Co Ltd.*

**[1a]** Sebagai peraturan am, Mahkamah Rayuan adalah terikat dengan keputusan sendiri. Tiga pengecualian yang diputuskan dalam *Young v. Bristol Aeroplane Co Ltd* adalah: (i) keputusan Mahkamah Rayuan yang diberikan per incuriam tidak perlu diikut; (ii) apabila berhadapan dengan konflik berkenaan dengan keputusannya sendiri yang terdahulu, Mahkamah Rayuan boleh memilih keputusan yang mana hendak diikut, tanpa mengira tarikh keputusan diberikan; dan (iii) Mahkamah Rayuan tidak patut mengikuti keputusannya sendiri yang terdahulu jikalau keputusannya sendiri yang terdahulu itu, secara ternyata ataupun tersirat, telah ditolak oleh Mahkamah Persekutuan, ataupun jikalau ianya tidak selaras dengan keputusan Mahkamah Persekutuan. Berkenaan dengan pengecualian (i) di atas, perkataan-perkataan 'per incuram' harus ditafsirkan secara sempit yang memberikan makna 'suatu keputusan yang diberi tanpa menyedari ataupun dengan melupakan suatu peruntukan statut yang tidak selaras ataupun berkenaan dengan nas yang mengikat dalam mahkamah yang berkenaan.

**[1b]** Mahkamah yang berada pada tahap di bawah Mahkamah Rayuan tidak boleh bergantung kepada pengecualian *'per incuriam'* yang dipakai oleh Mahkamah Rayuan untuk dirinya sendiri, tetapi boleh memilih di antara dua keputusan yang bercanggah, tanpa mengira tarikh keputusan yang bercanggah itu.

**[1c]** Walaupun Pernyataan Amalan (Duluan Kehakiman) 1966 yang keluarkan oleh House of Lords adalah tidak mengikat Mahkamah Persekutuan, secara amalan, ianya telah diikut. Mahkamah Persekutuan (dan mahkamah sebelumnya, iaitu Mahkamah Agung) tidak pernah enggan menolak keputusannya sendiri yang terdahulu apabila ianya kelihatan wajar untuk berbuat demikian. Kuasa untuk menolak hendaklah dan patut dilaksanakan secara sekali-sekala sahaja. Secara perbandingan, kuasa untuk menolak adalah jelas ketika keputusan terdahulu yang hendak ditolak itu adalah salah, kurang jelas, tidak adil dan tidak terpakai dalam keadaan-keadaan moden.

**[1d]** Kesan ataupun kekuatan keputusan panel Mahkamah Persekutuan yang terdiri lebih dari 3 orang ahli ataupun suatu 'Mahkamah Penuh' berbanding dengan koram biasa yang terdiri dari 3 orang ahli adalah sama.

**[1e]** Apabila terdapat dua keputusan Mahkamah Persekutuan yang bercanggah atas persoalan undang-undang, keputusan yang terakhir akan mengatasi keputusan yang terdahulu.

**[1f]** Oleh yang demikian, dan sebagai jawapan kepada persoalan (i) rujukan ini, dalam suatu rayuan terhadap pembebasan di akhir kes pendakwaan, seorang hakim rayuan tidak boleh enggan memakai keputusan terakhir Mahkamah Persekutuan atas suatu persoalan undang-undang dan sebaliknya memakai suatu keputusan terdahulu mahkamah yang sama.

**[2]** Semasa perbicaraan rayuan di Mahkamah Tinggi terhadap perintah pembebasan oleh Mahkamah Sesyen, darjah pembuktian yang diperlukan oleh pihak pendakwa pada akhir kesnya adalah darjah *'prima facie'*. Pernyataan dalam kes-kes *Munusamy v. PP, Haw Tua Taw v. PP* dan *PP v. Chin Yoke* – yang membentuk dasar ujian 'prima facie' akan menghalang hakim daripada menilaikan kebenaran cakap dan kebolehpercayaan saksi-saksi pendakwa pada tahap itu.

**[2a]** Oleh yang demikian, dan sebagai jawapan kepada persoalan (ii) rujukan ini, Mahkamah Tinggi adalah betul dari segi undang-undang dalam memutuskan bahawa Mahkamah Sesyen adalah salah kerana telah menilaikan dan menimbangkan keyakinan, kebolehpercayaan dan kebenaran cakap saksi-saksi pendakwa.

**[3]** Ianya merupakan peraturan yang mantap bahawa hakim patut memberi amaran kepada dirinya sendiri akan bahayanya mensabitkan seseorang tertuduh berdasarkan keterangan rakan jenayah kecuali jikalau keterangan tersebut disokong; tanpa amaran tersebut, suatu mahkamah rayuan akan membatalkan sabitan tersebut. Tindakan hakim semata-mata untuk memberikan amaran kepada dirinya sendiri adalah tidak cukup untuk menghalang pembatalan sabitan, jikalau hakim, tanpa keterangan sokongan yang perlu itu, telah memutuskan walau bagaimanapun untuk mensabitkan kerana dia telah mempercayai keterangan rakan sejenayah walaupun terdapat risiko, kecuali jikalau hakim selanjutnya menyatakan bahawa kes tersebut dibuktikan tanpa keraguan yang munasabah.

**[3a]** Dalam kes ini, pengadu bukanlah seorang rakan jenayah pemohon berkenaan dengan pertuduhan terhadap pemohon, iaitu penipuan. Walau bagaimanapun, berdasarkan s. 146(c) Akta Keterangan 1950, keterangan pengadu harus dikendalikan secara berhati-hati kerana dia merupakan seorang yang berwatak buruk.

**[3b]** Dengan yang demikian dan sebagai jawapan kepada persoalan (ii) rujukan ini, dalam rayuan terhadap pembebasan, di mana hakim perbicaraan mendapati bahawa sokongan adalah perlu untuk unsur penting dalam pertuduhan tersebut, maka hakim rayuan boleh mengakaskan perintah pembebasan tanpa membincangkan sebab yang diberikan oleh hakim perbicaraan untuk sokongan tersebut, asalkan, tanpa keraguan, terdapat keterangan yang dengan sendirinya ataupun keterangan yang kuat dari mana-mana punca lain yang dapat membuktikan kes terhadap tertuduh tanpa keraguan yang munasabah.

**[4]** Pindaan yang dibuat oleh Akta (Pindaan) Kanun Acara Jenayah 1997 kepada s 173(f) dan s. 180 Kanun Acara Jenayah hanya terpakai kepada tindakan ataupun peninggalan yang terjumlah kepada suatu kesalahan jenayah pada ataupun selepas 31 Januari 1997. Pindaan tersebut adalah tidak beroperasi secara kebelakangan.

**[4a]** Berkenaan tindakan ataupun peninggalan yang dilakukan sebelum 31 Januari 1997, darjah pembuktian yang diperlukan di pihak pendakwaan pada akhir kesnya masih adalah darjah tanpa keraguan yang munasabah seperti yang dinyatakan dalam *Arulpragasan Sandaraju v. PP*. Ratio dalam *Arulpragasan Sandaraju v. PP* dari segi amalan mempunyai kesan kebelakangan.

**[5]** Berkenaan dengan perundangan atas undang-undang substantif, terdapatnya suatu peraturan anggapan bahawa ianya tidak beroperasi secara kebelakangan tanpa niat yang menyatakan sebaliknya oleh

perkataan-perkataan yang nyata ataupun secara tersirat. Secara perbandingan, berkenaan dengan perundangan undang-undang keterangan dan prosedur, anggapannya adalah bahawa ianya beroperasi secara kebelakangan jikalau tidak ada niat yang bertentangan, kecuali jikalau pemakaian perundangan tersebut melucutkan hak kukuh seseorang itu dan melanggar perkara 7 Perlembagaan Persekutuan.

**[6]** Parlimen mempunyai kuasa pleno untuk menggubal undang-undang sivil dan jenayah secara kebelakangan; walau bagaimanapun, ketika ianya menggubal undang-undang jenayah secara kebelakangan, ianya patut mengelakkan perkara 7 Perlembagaan Persekutuan.

*[Perintah Mahkamah Tinggi diketepikan; perintah pembebasan Mahkamah Sesyen dihidupkan; pemohon dibebaskan dan dilepaskan.]*

**Cases referred to:**
*Munusamy v. PP [1987] 1 MLJ 492* ***(refd)***
*PP v. Chin Yoke [1940] MLJ 37* ***(refd)***
*Haw Tua Tau v. PP [1981] 2 MLJ 49* ***(refd)***
*Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597* ***(refd)***
*Khoo Hi Chiang v. PP [1994] 2 CLJ 151* ***(cit)***
*Tan Boon Kean v. PP [1995] 4 CLJ 456* ***(cit)***
*Young v. Bristol Aeroplane Co Ltd [1944] KB 718* ***(foll)***
*Morelle v. Wakeling [1955] 2 QB 379* ***(foll)***
*Cassell & Co v. Broome [1972] AC 1027* ***(foll)***
*London Tramways v. London County Council [1898] AC 375* ***(refd)***
*Reg v. National Insurance Comissioner, ex p Hudson [1972] AC 944* ***(refd)***
*Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187* ***(cit)***
*Chiu Nan Hong v. PP [1965] MLJ 40* ***(cit)***

**Legislation referred to:**
Civil Law Act 1956, s. 3
Criminal Procedure Code, ss. 173(f), 180
Criminal Procedure Code (Amendment) Act 1997
Evidence Act 1950, s. 146(c)
Federal Constitution, art. 7(1)

*[Appeal from High Court Malaya, Kuala Lumpur; Criminal Appeal Bil: 52-61-88]*

*For the applicant - Gurbachan Singh; M/s Bachan & Kartar*
*For the respondent - Mohd Yusof Zainal Abidin, DPP; A-G's Chambers*

## JUDGMENT

**Peh Swee Chin FCJ:**

This criminal reference brought under the old s. 66 (since repealed) of the Courts of Judicature Act 1964 deals with an alleged offence of cheating against the applicant which was alleged to have taken place on 7 May 1983. The applicant was originally charged in the Sessions Court, Kuala Lumpur and was acquitted and discharged on 31 January 1985 at the close of prosecution case without his defence being called. The Public Prosecutor then appealed against such an order of acquittal to the High Court which set aside the order of acquittal and ordered a retrial.

The retrial before a different Sessions Court judge took place and at the close of the case for the prosecution, the applicant was again acquitted and discharged for the second time without his defence being called. For the second time the Public Prosecutor again appealed and again the appeal was allowed, the order of acquittal was again set aside, ordering further that the applicant be called for his defence.

This time, the applicant was dissatisfied with the decision of the High Court and he applied for leave to refer to the Supreme Court certain questions of law. The Supreme Court, on 4 February 1991, allowed the application in respect of the following questions:

**QUESTION 1**

In an appeal against acquittal at the close of the case of the Prosecution, can an Appellate Judge refuse to apply with or without assigning any reason, the latest decision of the Supreme Court on a point of law and adopt an earlier decision of the Federal Court?

**QUESTION 2**

Whether the Appellate Court in hearing an appeal against an acquittal at the close of Prosecution Case was right in law in holding that the Learned President of the Sessions Court was wrong in assessing and weighing the reliability, credibility and veracity of the prosecution witnesses when the Supreme Court held in *Munusamy v. PP* [1987] 1 MLJ 492 that:

> in considering the question of law whether there is some evidence (not inherently incredible) to prove one or more of the essential ingredients of the offence the judge or magistrate must by necessity evaluate and weigh all the evidence. If there is no evidence at all to prove one or more of the essential ingredients of the offence the accused must be acquitted without calling for his defence. The requirement of s. 180 or s. 173(f) of the Criminal Procedure Code cannot be properly complied

a with unless the judge or magistrate considers and evaluates all the evidence adduced by the prosecution as tested in cross-examination

Which not only allows a court to do so but also imposes a duty to do so.

**QUESTION 3**

b In an Appeal against acquittal, where the Trial Judge found corroboration was required on an essential ingredient of the charge, can an Appellate Judge reverse the order of acquittal without dealing with the reason given by the Trial Judge on the need of such corroboration?

c The ascertaining of answers to at least two of the above questions would at least require a discussion as to what should have been the burden of proof applicable at the end of the prosecution case against the applicant at that time in the second trial before the Sessions Court; should it be a proof beyond a reasonable doubt or a mere proof of a *prima facie* case? The impact of the recent amendment to the Criminal Procedure Code to restore the test of *prima* d *facie* case at the close of prosecution case would also have to be discussed. We will revert to these later and more elaborately.

The Sessions Court at the second trial had acquitted and discharged the applicant at the close of prosecution case by employing the test of *prima facie* e case as expressly adopted in *Munusamy v. PP* [1987] 1 MLJ 492. The Session Court further cited for support the dictum of Gordon Smith JA in *PP v. Chin Yoke* [1940] MLJ 37, which it said was cited and approved by Supreme Court itself in the Munusamy case. The said dictum is as follows:

f ... that the Magistrate or judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejection; some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accuse's conviction. In such case the accused is then called upon to answer the *prima facie* case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution g one is satisfied that it would be wholly unsafe to convict on the evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.

A very brief summary of the evidence would be necessary to show how the Sessions Court actually applied the dictum to the evidence. h

The applicant, then an advocate and solicitor, asked for and received RM60,000 from the complainant, a goldsmith. The receipt of the money was proved positively and was not disputed either. The complainant, before he paid the sum, had been robbed by some persons of some gold ornaments worth about i RM200,000. He lodged a report to the police, and it transpired, that the police

had suspected him of making a false report for the purpose of making a false insurance claim. The complainant was for this reason detained by the police for four days and later released. The applicant was employed by some relative of the complainant to act for the complainant, to defend him apparently on an impending charge of making a false report.

It was the story of the complainant that the applicant told him in whispering terms to the effect that the "OCPD" of Ampang police and the "DPP" (Deputy Public Prosecutor) could be bribed so that no further action would be taken. The sum of money for this purpose was quickly negotiated and agreed by the applicant and the complainant at RM40,000 for the two persons, and another sum of RM20,000 for the applicant's professional fee. It was the allegation of the complainant that the applicant told him to the effect that the further action sought to be prevented was that the police intended to detain him at Pulau Jerejak or at the police station for making a false robbery report.

The police, had after the complainant's report of robbery, seized 86 cheques, gold ornaments worth about RM70,000 and other items including the complainant's firearms etc. The applicant was apparently engaged to secure the release of these; to make an insurance claim; and to defend the accused of the false robbery report. The complainant said, *inter alia*, that he had agreed to give half of the value of gold ornaments seized by the police to the applicant.

The robbery report turned out to be probably genuine, and the alleged robbers were subsequently arrested and charged in court.

For some six months after the robbery report, the complainant lodged again a second report to the police about the alleged offence of cheating by the applicant, such report having been lodged on the advice of another lawyer who was a former partner of the applicant and who was at the time practising separately. At the time, the former firm of partnership (since dissolved) but earlier comprising the applicant and that other lawyer, was facing a claim for negligence attributed by some suing client to the said applicant.

After considering the evidence, the Sessions Court found it could not rely on the evidence of the complainant, his mother and brother, describing *inter alia,* three of them as being "in no better position than that of an accomplice whose testimony as a matter of prudence requires corroboration." The Sessions Court found that there was no corroborative evidence for the demand of the money in question as alleged by the complainant and forming the substance of the cheating charge.

His further finding was, after referring to various parts of the evidence, that there was every possibility that the payment of RM40,000 (out of the larger sum of RM60,000) was for payment of fee for the applicant as well and that the second police report about cheating by the applicant was "itself suspect" ie, possibly false.

Looking at the questions posed in pursuance of leave granted earlier, they relate to the alleged errors of the Sessions Court in assessing credibility and reliability of witnesses and also on corroboration in regard to the evidence on the essential ingredients of the charge in question. It behoves us to go into the evidence in this case because the nature of the questions posed makes it necessary, in addition to the other exercisable discretion that as a matter of justice the highest court of the land could go into such evidence to prevent any miscarriage of justice. We have mentioned the salient points of the evidence earlier in order to understand the nature of the questions posed and such evidence comes in handy also for review on which we have decided and re-consideration to see if any miscarriage of justice had occurred in this case.

In order to find out if the Sessions Court had erred in assessing credibility, reliability and veracity of prosecution witnesses, it would be essential to conclude first one way or another whether such assessment had indeed taken place. By disbelieving the evidence of the complainant and his mother and brother, who alleged the sum RM40,000 was for the two officers, and in view of other circumstances mentioned by the Sessions Court including the fact that the report of cheating was only lodged 6 months after the robbery report by the complainant on the advice of the applicant's former partner who had reason to be unhappy with the applicant, it is an inevitable conclusion that the Sessions Court had embarked itself in assessing the reliability and credibility of witnesses. Was the Sessions Court wrong in doing so? To answer this question and indeed to answer one other question referred to us, we would have to discuss a number of connected topics, in order to explain our answers to be given later.

To revert to the question whether the Sessions Court was wrong in assessing the reliability etc. of the prosecution witnesses, at the time of the hearing of the appeal by the learned judge in the High Court from the Sessions Court's order of acquittal, the test of *prima facie* case at the close of prosecution case was still the law vide *Munusamy's* case *(supra)* based on Lord Diplock's judgment in *Haw Tua Tau v. PP* [1981] 2 MLJ 49, and for that matter, the dictum of *Chin Yoke's* case *(supra)*, the learned judge was therefore then right at the time of the hearing of the appeal. The meaning of the test of *prima facie* case at the end of the prosecution case is best stated by Azmi FCJ in *Arulpragasan v. PP* [1996] 4 CLJ 597 at 619 in the following words.

> On the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted?

It would not do any violence to the language to say that the word, "accurate" could mean or should mean "true" in the above quotation. It would also not be off the mark to say the words, "prosecution evidence" in the same quotation refers to the evidence of "primary facts" mentioned by Lord Diplock who held that the prosecution made out a case by adducing such evidence of such primary facts in *Haw Tua Tau v. PP* [1981] 2 MLJ 49, 51. Such evidence of primary facts could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence, such as death as one of the ingredients in a murder case. Once there is sufficiency of such evidence, so long as it is not inherently incredible such as the landing of a flying saucer from outer space on Dataran Merdeka in Kuala Lumpur, a *prima facie* case is made out. In concluding on the sufficiency of such evidence to satisfy the said ingredients there will be sometimes a lot of rejection of irrelevant or inadmissible evidence. It is in this connection that the dictum in *Chin Yoke's* case must be understood. It should be borne in mind that Gordon Smith JA who did not make it very clear, was then dealing with a novel, and with hindsight, a difficult point as well, a point taken very much for granted by people for what they respectively meant. The dictum, especially that part of it about "it would be wholly unsafe to convict on the evidence standing alone" is very consonant with the judgment of *Haw Tua Tau (supra),* and the meaning of *prima facie* case set out above. Such being the case, the said dictum which forms part of an explanation of what appears to be a *prima facie* case, would **not** entitle one to assess the veracity or credibility of evidence of witnesses as the Sessions Court had done by purportedly relying on the said dictum at the close of prosecution case.

It is history now that *Munusamy's* case *(supra)* was overruled by *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151, which was in turn overruled by *Tan Boon Kean v. PP* [1995] 4 CLJ 456 which was in turn overruled by the majority judgment in *Arulpragasan.* All the cases were either in the Federal Court or in the Federal Court's forerunner, ie, the Supreme Court. The judgment in *Arulpragasan* had settled the question ie, that the burden of proof at the close of prosecution case was proof beyond a reasonable doubt. By saying so, we have assumed that a later decision prevails over an earlier decision in the Federal Court and the question of comparative weights of a seven-man panel in *Arulpragasan (supra);* three-man panel in *Tan Boon Kean (supra)* and five-man panel in *Khoo Hi Chiang (supra)* looms large as well. We would have to explain also all such things, and we do as follows.

The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

The said exceptions are as decided in *Young v. Bristol Aeroplane Co. Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956, *vide* its s. 3.

To recap, the relevant *ratio decidendi* in *Young v. Bristol Aeroplane's* case is that there are 3 exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v. Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the 3 exceptions in *Young v. Bristol Aeroplane.*

A few words need be said about a decision of Court of Appeal made *per incuriam* as mentioned above. The words *"per incuriam"* are to be interpreted narrowly to mean as per Sir Raymond Evershed, MR in *Morelle v. Wakeling* [1955] 2 QB 379, 406 as a "decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong." It should be borne in mind that the year of *Morelle's* case is 1955 whereas s. 3 of the Civil Law Act was enacted in 1956. The ratio in *Morelle's* case is also part of the common law applicable to us.

In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion.

In this connection, it is interesting to refer to *Cassell & Co. v. Broome* [1972] AC 1027, 1054. It was held that courts in the lower tiers below the Court of Appeal could not rely on the *per incuriam* rule applied by Court of Appeal

for itself, but could choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.

The rule of judicial precedent in relation to the House of Lords was stated in *London Tramways v. London County Council* [1898] AC 375 that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made *per incuriam,* and that the correction of error was normally dependent on the legislative process.

However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the "Practice Statement (Judicial Precedent) 1966" which is set out below:

> **LORD GARDINER LC:** Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordship nevertheless recognise that too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the need especially for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.

Experience in the United Kingdom has shown that the power "to depart from a previous decision when it appears right to do so" has been used very sparingly.

In Malaysia, the Federal Court and its forerunner ie, Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so, see the above-mentioned Federal Court's cases on the question of burden of proof at the close of prosecution case.

Though the Practice Statement (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly also. It is right that we in the Federal Court, should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it can not be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a *ratio decidendi* before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions.

In this connection, the question of a "full court" or a panel of Federal Court compising more than 3 members as compared with the ordinarily constituted quorum of 3 members of the same court, arises for consideration. In view of the reasons about departing from its previous decisions advanced above, the effect or weight of a decision of a "full court" and that of an ordinary quorum is the same by necessary implication. A full court or a panel larger than the ordinary quorum is usually indicated such as when an unusually difficult or controversial question of law is involved, or a question arises as to whether a previous decision of the Federal Court ought to be overruled.

If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

We are now in a position to deal with "Question 1" posed to us and as set out above and our answer is in the negative.

When leave was granted in February 1991 to refer "Question 2" posed to us and as set out above, and for that matter, when the High Court heard the appeal in 1990 from the decision of the Sessions Court in question, the legal position of the burden of proof at the close of the prosecution case was still governed by the test of *prima facie* case as in *Munusamy's* case, so in answering the question cast in the past tense to indicate 1990, it should be borne in mind that position of law referred to was as in 1990.

The answer to "Question 2" therefore is in the affirmative.

In this connection, if "Question 2" had not been framed in the past tense so as to require an answer applicable in 1991 about the burden of proof at the close of prosecution case, but if it were cast in the present tense instead, then it is piquant that the Sessions Court would have been right in so assessing the reliability etc. of prosecution witnesses at the close of the prosecution case, because, at the time of our hearing this reference, the burden of proof beyond a reasonable doubt at the close of prosecution case as enjoined by the ratio of the *Arulpragasan* case would be applicable subject to what we have to say about the latest amendment to the Criminal Procedure Code.

Saying so above would give practically retrospective effect to the said ratio of *Arulpragasan's* case decided in 1997 to apply to the instant case, but there is nothing wrong in this. It has long been the view and legal theory that judges are explorers or expounders of the law which has always been there waiting to be discovered and expounded. Such expounding may amount further to a limited form of judicial law-making but that is an inevitable consequence of judicial process as we know it. Interestingly it appears that in the United States of America, the Judges of Supreme Court there have the power to limit also the effect of their overruling a previous decision of theirs only prospectively, so as not to affect the parties presently before them, with such overruling vide also the interesting comment of Lord Simon of Glaisdale in *Reg. v. National Insurance Comissioner, Ex parte Hudson* [1972] AC 944, 1206 on this power which we do not have here.

The true position of the legal burden of proof at the close of prosecution case with regard to the amendment to the Criminal Procedure Code in question would have to be dealt with as the said amendment had already come into effect before we heard this criminal reference. We should deal with it presently.

With regard to the summary criminal trials before the subordinate courts, its s. 173(f), was with effect from 31 January 1997, *inter alia,* amended by Criminal Procedure Code (Amendment) Act 1997 which for the test of *prima facie* case at the close of prosecution case reads as follows:

> (f)(1) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

Similar amendment was made at the same time by the same amendment Act to trials before the High Court in connection with adopting the similar test

by, *inter alia*, amending its s. 180. We shall refer to these particular amendments as the said amendment collectively hereafter.

The said amendment would apply, in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997 the test laid down in *Arulpragasan's* case ie, that of proof beyond a reasonable doubt at the close of prosecution case, would still apply. We have to and we would presently give our reasons for saying so.

Parliament has plenary power to make retrospective criminal and civil law *vide Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, but when it makes such retrospective criminal law, it must steer clear of the Art. 7, or for the purpose of the instant case, art. 7(1) of the Federal Constitution.

The said amendment is not couched in terms, either expressly or by necessary implication, which would make it retrospective in operation, therefore the infringement of the said art. 7(1) does not appear to arise.

Assuming that the said amendment had been, expressly or by necessary implication, made to apply retrospectively, it would have run foul of art. 7(1) of the Federal Constitution in the manner mentioned below. Article 7(1) reads as follows:

> 7 (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

The said amendment if enacted to operate retrospectively would have so run foul because if an act or omission before 31 January 1997 cannot evidentially be proved at any time to have been committed beyond a reasonable doubt at the close of prosecution case, the perpetrator of the act or commission would not be called for his defence and therefore would not be punishable any more. But if the act or omission in question not punishable in the way stated above can be proved by way of a *prima facie* case at the close of prosecution case, (a much lesser burden of proof) then the said perpetrator will have his defence called. He will then be in jeopardy of failing possibly to throw or cast a reasonable doubt on the prosecution case, and such failure will be punished in a manner as provided by law. Article 7(1) of Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter.

The said amendment could be viewed from another angle which this court should not be blinkered from seeing.

We have mentioned elsewhere often that in connection with any legislation on substantive matters of laws that there is a rule of presumption that it is not retrospective in operation, in the absence of a contrary intention by express words or necessary implication. But on any legislation on evidence or on procedure, there is a twist of such rule of presumption, this time round the presumption now is that such legislation is retrospective in operation in the absence of a contrary intention thereto by express words or necessary implication, subject to one exception as follows.

The exception is that such presumptive retrospective operation would not apply when the effect of applying retrospectively such legislation on procedure or on evidence would be to deprive a person of a vested right in civil cases or in criminal cases, (as in this criminal reference before us) when it would offend against the art. 7(1) of the Federal Constitution. Viewed from the said angle therefore, the said art. 7(1) would still have the effect of barring the retrospective criminal law on evidence or procedure to the extent in the said art. 7(1) despite such a twist of the rule of presumption. Thus it would be of no avail for anyone to contend that the said amendment in question, being by its nature, procedural or evidential, would operate retrospectively even if it is not cast in retrospective terms.

On "Question 3" as set out above and referred to us, since the question was drafted in the present tense, our answer to it is a qualified "yes" ie, (to quote the words of the question in our answering) that "in an appeal when the Trial Judge found corroboration was required on an essential ingredient of the charge" the appellate Court can "reverse the order of acquittal without dealing with the reason given by the Trial Judge on the need of such corroboration" if there is undoubtedly sufficient evidence by itself or overwhelming evidence from elsewhere in the case to prove beyond a reasonable doubt a case against the accused, thereby causing no miscarriage of justice to the accused, notwithstanding the failure to deal with the reasons given by the Trial Judge.

It would be necessary to explain the actual nature of that evidence before the Sessions Court that is said to require corroboration lest our answer to "Question 3" is misinterpreted.

There is the well known rule that a judge must warn himself of the danger of convicting an accused person on the evidence of an accomplice unless such evidence is corroborated and in the absence of such warning, the appellate court will quash the conviction. Such mere act of warning himself however will not be sufficient to prevent such quashing of such conviction when the judge, without the necessary corroborative evidence, nonetheless decides to so convict because he is convinced by the complainant's evidence despite such risk, unless he in such event says further that the case has been proved beyond

a reasonable doubt. Normally this could be sufficient, see *Chiu Nan Hong v. PP* [1965] MLJ 40, 43. In the matter of warning of danger of convicting without corroboration, the fact that *Chiu's* case was a rape case makes no difference.

The relevant evidence at the trial shows that the accused was charged with cheating the complainant by obtaining money from the latter as a result of the accused telling the complainant that such money was required by the "DPP" and the "OCPD" of Ampang to settle the matter of false robbery report made by the complainant, otherwise he would be sent to "Pulau Jerejak" or would be detained at the police station again. On a moment's reflection, the charge facing the accused was not that of bribing or attempting to bribe the said "DPP" or "OCPD" of Ampang, but cheating the complainant of his money by making a pretence of promise of such bribing. If the accused had been charged with such bribing of the "DPP" and OCPD", then indisputably the complainant would be an accomplice for such a charge for they both would have been *particeps criminis* in it. But on such a cheating charge the complainant was not an accomplice. It is to be remembered that even under the Prevention of Corruption Act as revised in 1971 and since repealed very recently and replaced by a new Act, a person who was an accomplice only by reason of making a corrupt payment was not presumed to be unworthy of credit, thus modifying somewhat the said well-known general rule of warning of the danger above-mentioned for corruption offences under that Act.

Notwithstanding the fact that complainant and for that matter, the other relatives involved, were not in fact accomplices, their evidence would have however to be treated with some caution; in other words, the evidence might not be given full credit normally but only some degree of it i.e. less weight might be given because they were persons of bad character for going along with the idea of the said bribing. Section 146(c) of Evidence Act 1950 has by necessary implication, or expressly, provided for such caution; it is set out below:

> s. 146: When a witness may be cross-examined he may, in addition to the question hereinbefore referred to, be asked any questions which tend -
>
> (a)
>
> (b)
>
> (c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to in criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Generally, by conventional wisdom, the bad moral character of a man may impair, more often than not, his regard for truth.

Viewed in the light of the said s. 146, having regard to the burden of proof beyond a reasonable doubt at the close of prosecution case, such burden being applicable to this case; taking account of the Sessions Court having the opportunity of seeing and hearing the witnesses, we feel it unsafe to interfere with the order of acquittal of the Sessions Court which must be treated as having resulted from a benefit of doubt being given to the accused on account of unreliability of the evidence of the complainant and his relatives.

We therefore confirm the order of the acquittal of the Sessions Court made at the close of prosecution case, the test of *prima facie* case was not applicable on the facts of the instant case for reasons already given. Consequently, we set aside the order of the High Court dated 26 July 1990 and restore the order of the Sessions Court dated 25 November 1988. The applicant is therefore acquitted and discharged of the offence as charged.

*Reported by Gan Peng Chiang*

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